

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Amendment of Part 90 of the Commission's
Rules to Facilitate Future Development of
SMR Systems in the 800 MHz Frequency
Band

PR Docket No. 93-144

COMMENTS OF SOUTHERN COMPANY

Southern Company, by and through counsel and pursuant to Section 1.415 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), respectfully submits the following Comments in response to the Public Notice issued by the Commission in connection with the above captioned proceeding.¹

I. BACKGROUND

In the 1993 Budget Act, Congress established a national policy mandating that all participants in the commercial wireless industry be afforded equal regulatory treatment.² Congress intended to establish "uniform rules to govern the offering of all commercial mobile service."³ Congress mandated that the FCC modify its rules to ensure that all licensees in the wireless industry are subject to the same rules.⁴ The House Report accompanying the legislation states that the changes in the regulatory regime establish "regulatory parity" and explains the

¹ Public Notice, Commission Requests Comment, Pursuant to *Fresno Mobile Radio, Inc. v. FCC*, on the Construction Requirements for Commercial, Wide-Area 800 MHz Licensees Operating on Non-SMR Channels Through Inter-Category Sharing, PR Docket No. 93-144, FCC 00-95, (released March 10, 2000) ("Public Notice").

² Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66 §6002, 107 Stat. 312, 397 (1993) ("1993 Budget Act").

³ H.R. Rep. No. 103-111 at 259, reprinted in 1993 U.S.C.C.A.N. 378, 586.

⁴ 1993 Budget Act §6002(d)(3)(B).

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changes are "to provide that services that provide equivalent mobile services are regulated in the same manner."⁵

The FCC has extended this Congressional mandate to the 800 MHz SMR service in fits and starts. First, the FCC concluded that SMR licensees who provide interconnected service would be classified as CMRS providers.⁶ The FCC explained that "[t]his approach will result in CMRS classification for any wide-area SMR that intends to offer for-profit interconnected service, as we expect most such systems to do. This is consistent with Congress's goal and the views of most commenters that SMRs providing interconnected service on a competitive basis with cellular carriers should be regulated similarly to cellular carriers."⁷

Having classified interconnected 800 MHz SMR services as CMRS providers, the FCC then found that all CMRS licensees -- including paging, SMR, PCS and cellular -- are actual or potentially competing services.⁸ Based on this analysis, the FCC concluded that 800 MHz SMR licensees are entitled to comparable regulatory treatment with other CMRS service providers.⁹

⁵ H.R. Rep. No. 103-111 at 259, *reprinted in* 1993 U.S.C.C.A.N. at 586. See also H.R. Conf. Rep. No. 103-213, 498 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1187.

⁶ *Implementation of Section 3(n) and 332 of the Communications Act, Second Report and Order* ("CMRS Second Report and Order") ¶90, 9 FCC Rcd. 1411, 1450-517 (1994).

⁷ *Id.* at ¶91.

⁸ *Implementation of Section 3(n) and 332 of the Communications Act, Third Report and Order* 9 FCC Rcd. 7988, 7996-97 (1994) ("CMRS Third Report and Order"); see *Amendment of Part 90 of the Commissions's Rules to facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and Order, and Second Notice of Proposed Rulemaking* ("800 MHz Report and Order") ¶42, 11 FCC Rcd. 1463, 1493 (1995) (describing CMRS Third Report and Order).

⁹ CMRS Third Report and Order ¶94, 9 FCC Rcd. at 8042; see also 800 MHz Report and Order ¶102, 11 FCC Rcd. at 1520.

This should have been the end of the matter. Having found that 800 MHz SMR service providers are entitled to regulatory parity, the FCC should have extended population-based EA construction standards to all 800 MHz SMR service providers. But the FCC did not do this. Rather, the FCC extended population-based construction standards only to new 800 MHz SMR EA licensees, and denied population-based standards to incumbent wide area 800 MHz SMR service providers.¹⁰

Southern Company appealed the FCC's decision to deny population-based construction standards to incumbent wide area 800 MHz SMR service providers to the United States Court of Appeals for the D.C. Circuit. The Court of Appeals found that the FCC had failed to articulate a satisfactory explanation for its refusal to extend [population-based construction standards] to wide-area SMR licensees, vacated the FCC's order and remanded the matter to the agency for reconsideration.¹¹ In the interim, the Court held that the Commission "shall not deny Southern the benefit of [population-based construction standards]."¹²

On remand, the Commission determined that "[t]he record on remand demonstrates that incumbent wide-area SMR licensees such as Southern do provide service that is similar, if not identical, to that provided by EA licensees and other CMRS providers."¹³ The Commission concluded that incumbent SMR licensees were "sufficiently similar" to EA licensees that they should have "similar flexibility" with respect to construction requirements, and thus that

¹⁰ *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Memorandum Opinion and Order on Reconsideration* ¶81, 12 FCC Rcd. 9972, 9997 (1997) ("Memorandum Opinion and Order on Reconsideration").

¹¹ *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C.Cir. 1999).

¹² *Id.*

¹³ *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, Memorandum Opinion and Order On Remand, FCC 99-399 at ¶12 (rel. December 23, 1999), 65 Fed. Reg. 7749 (pub. February 17, 2000) ("Remand Order").

incumbent SMR licensees would have the "option of complying with the terms of their [extended implementation] authorizations or applying the EA construction requirements to their wide-area systems."¹⁴

Once again, this should have been the end of the matter. But once again, it was not. Buried in the back of the Remand Order was a paragraph which stated the Order, and indeed the *Fresno* decision itself, did not cover Business and Industrial/Land Transportation (BI/LT) frequencies converted under inter-category sharing for SMR use.¹⁵ The Commission suggested that the construction standards applicable to SMR licensees operating on converted BI/LT spectrum would be considered in the context of the Commission's separate rulemaking proceeding to implement the Balanced Budget Act of 1997.¹⁶ Subsequently, the Commission reversed its position and decided to address the construction status of converted BI/LT channels via a Public Notice seeking further comment on this issue in the instant *Fresno Remand* proceeding.¹⁷

II. THE 1993 BUDGET ACT MANDATES POPULATION-BASED CONSTRUCTION STANDARDS FOR CONVERTED BI/LT CHANNELS

Southern has now spent four long years seeking to obtain the regulatory parity mandated by Congress in the 1993 Budget Act, without success. Southern has briefed this issue before the FCC on seven separate occasions.¹⁸ Among other things, the briefs -- particularly those in the

¹⁴ *Id.*

¹⁵ *Id.* at ¶20.

¹⁶ *Id.* at ¶20, n.61.

¹⁷ Public Notice at 2.

¹⁸ Petition for Reconsideration of the First Report and Order and Eighth Report and Order, PR Docket 93-144, GN Docket No. 93-252 and PP Docket 93-253 (March 18, 1996); Response to Request for Rejustification of Extended Implementation Authority, PR Docket 93-144, PP Docket 93-253 (July 15, 1996); Supplement to Request for

rejustification proceeding -- make crystal clear that the Southern LINC system is composed of more than 95% converted BI/LT channels. Southern, the litigant in the *Fresno Mobile* case, has yet to obtain relief in the *Fresno Mobile* remand proceeding. This is the quintessence of capricious agency practice.

The Commission's finding in the *Remand Order* that the *Fresno* decision did not cover converted BI/LT channels is palpably untrue. The appeal covered "Incumbent Wide-Area SMR Licensees," as defined in the Commission's rules.¹⁹ No exception was carved out for converted BI/LT channels held by incumbent wide-area SMR licensees, either in the rulemaking proceeding or on appeal. Indeed, the underlying 800 MHz rulemaking proceeding had established a specific construction schedule for all of the incumbents' licenses, including those with converted BI/LT channels. The *Memorandum Opinion and Order on Reconsideration*, the subject of the *Fresno* decision, assigned a construction deadline for all of Southern's channels. Nothing in the *Memorandum Opinion and Order on Reconsideration* suggested the construction deadline did not apply to the converted BI/LT channels which make up 95% of the Southern LINC system. The FCC never once suggested on appeal that converted BI/LT channels were not being addressed. In short, the Commission's finding that the *Fresno* decision did not include converted BI/LT channels is simply incorrect.²⁰ Indeed, the Commission appears to acknowledge this mistake by concluding in the Public Notice that converted BI/LT channels will

Rejustification of Extended Implementation Authority, PR Docket 93-144, PP Docket 93-253 (November 27, 1996); Application for Review of Wireless Telecommunications Bureau Order on Rejustification of Extended Implementation Authority (June 19, 1997); Request for Interim Extension of Extended Implementation Authority (December 2, 1997); Request for Waiver of 47 C.F.R. §90.629 Construction Deadline (February 20, 1998); Comments on Construction Requirements for Wide-Area SMRs Pursuant To Fresno Mobile Remand, DA 99-974 (May 21, 1999). Each of these filings incorporated herein by reference.

¹⁹ 47 C.F.R. §20.3.

²⁰ Southern has appealed the Fresno Remand Order to the D.C. Circuit Court of Appeals. *Southern Company v. FCC*, Case No. 00-1075 (D.C. Circuit filed March 3, 2000). The appeal is pending.

not be addressed in the 1997 Balanced Budget Act rulemaking as originally proposed but instead will be dealt with in a separate order in the instant *Fresno Mobile Remand* proceeding.

A. There Is No Basis for Applying A Different Construction Standard For Converted BI/LT Channels.

There is no conceivable basis for applying a different construction standard to wide-area SMR licensees whose systems include BI/LT channels. The 1993 Budget Act calls for equal regulatory treatment for all competitors in the commercial wireless industry. The FCC has acknowledged that SMR licensees are competitors in the commercial wireless industry and thus are entitled to regulatory parity. The FCC has further acknowledged in the *Remand Order* that incumbent SMR licensees *like Southern* are entitled to the same kind of population-based construction standards enjoyed by the rest of the wireless industry. The same logic compels the conclusion that population-based standards should be extended to SMR licensees using converted BI/LT channels. For the same reasons as those addressed in the *Fresno* case, it would be arbitrary and capricious in the extreme to carve out one tiny sub-segment of the commercial wireless industry -- SMR licensees with converted BI/LT channels -- and to apply a different construction standard. Such action would impose a burden on companies like Southern with converted BI/LT channels that none of their competitors in the wireless business must bear.²¹ Such a result is fundamentally inconsistent with the principle of regulatory parity articulated by Congress in the 1993 Budget Act and affirmed by the FCC in a series of subsequent rulemaking decisions implementing the statute.

²¹ A site-by-site standard forces the provider to build out each site on pain of losing its licenses -- in effect, to pre-build the capacity for its system. Population-based standards, on the other hand, permit the provider to invest in expanding system capacity only when it needs to do so in response to user demand. If Southern is required to operate under a site-by-site standard for its converted BI/LT channels, it will be forced to spend up to \$200 million which it would not have to spend immediately under a population-based standard. None of Southern's competitors in the commercial wireless industry are required to pre-build their system capacity in this manner, since they are subject to population-based standards.

B. Public Policy Supports The Extension Of Regulatory Parity To Southern

In addition to the clear statutory command to extend regulatory parity to Southern, public policy considerations militate in favor of this result as well. In 1998, the Commission granted Southern a waiver to extend the construction schedule for its converted BI/LT channels based on its finding that the Southern LINC system served unique needs.²² The Southern LINC system is used extensively by the traditional public safety community. As the Commission noted, "many of Southern's subscribers are public safety agencies that have determined that they can best and most economically meet their communications needs by using Southern's wide area, digital radio network, rather than each constructing their own system."²³ Southern's system is well suited for public safety communications, as the Commission has pointed out, because in order to meet the internal communications needs of Southern's operating companies, this system is designed to provide uninterrupted service even in the wake of natural disasters.²⁴ In addition, the Commission stated that "Southern's system provides interoperability among participating agencies which the Commission has recognized as one of the most important public safety communications needs. We conclude that the public interest would be served by a waiver that promotes reliable, state-of-the-art, wide-area public safety communications and promotes interoperability."²⁵

Since the Commission's grant of Southern's waiver request, Southern has acquired even more public safety entity customers. To date, Southern serves more than seventy local law enforcement agencies (including police and sheriff's departments, fire department and 911

²² *In the Matter of Southern Company, Request for Waiver of Section 90.269 of the Commission's Rules, Memorandum Opinion and Order*, 14 FCC Rcd. 1851(WTB 1998) ("Waiver Order").

²³ Waiver Order at ¶13.

²⁴ *Id.*

service agencies), numerous city governments, state safety agencies as well as federal emergency management and law enforcement agencies, totalling over 150 public safety entities. During the recent tornadoes that struck southwest Georgia, for example, FEMA and DOT made extensive use of the Southern LINC system to assist in managing the emergency operations.

In its Waiver Order the Commission also recognized that Southern's system is unique in its pervasive coverage of rural areas where wireless communications are "particularly important due to the distances that must be covered and the relative scarceness of wireline communication facilities." ²⁶ The Commission also pointed out that "it does not appear that any other SMR operator will immediately meet such needs as we previously have noted that 800 MHz digital SMR providers are unlikely to begin serving small cities and rural areas in the near future. Thus the public interest would be served by a waiver that promotes the expeditious delivery of service to rural areas." ²⁷

Extending to Southern the geographic construction standards which all of its competitors now enjoy will have the same public interest benefits identified by the Commission in the 1998 Waiver Order. Southern continues to serve public safety entities in rural, underserved parts of its service area. Law enforcement has often commented to Southern about the unique and lifesaving aspects of having secure digital communications available over a wide area which allows instant communication with officers and other law enforcement agencies throughout an entire state. Southern is asking to be able to continue to develop this system on a rational basis, in a manner which will continue to serve the public interest in the ways already identified by the Commission. There is no harm to BI/LT entities from this decision since these are the very

²⁵ *Id.*

²⁶ Waiver Order at ¶14.

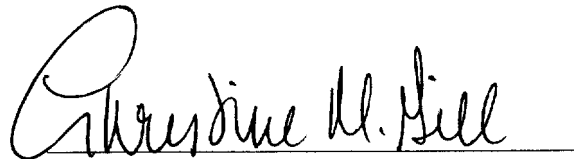
²⁷ *Id.*

entities that have chosen to take service from Southern and they therefore have the benefit of the use of these frequencies as well.

III. CONCLUSION

For the foregoing reasons, Southern respectfully requests that the Commission comply with the mandate of the 1993 Budget Act and the logic of its own decisions in the Memorandum Opinion and Order on Reconsideration²⁸ and Memorandum Opinion and Order on Remand²⁹ by extending population-based construction standards to incumbent SMR licensees operating on converted BI/LT channels.

Respectfully submitted,



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²⁸ Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 9972 (1997).

²⁹ Remand Order, PR Docket No. 93-144, FCC 99-399 (rel. December 23, 1999).

CERTIFICATE OF SERVICE

I, Dorene Tabaka, do hereby certify that on this 27th day of March, 2000, a copy of the foregoing "Comments of Southern Communications Services, Inc." was served by hand on each of the following:

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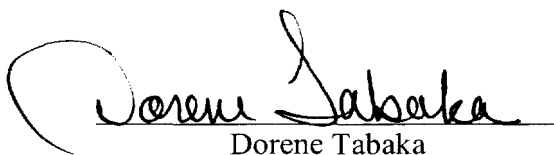
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